IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-685

WILLIAM S. NEIL, Warden,
Tennessee State Penitentiary,
Nashville, Tennessee,

Petitioner,

v.

ARCHIE NATHANIEL BIGGERS,

Respondent.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

In reply to the Petition for Writ of Certiorari, counsel for respondent, who has made application to proceed in forma pauperis, has filed a thirty-three page brief. Certain arguments are made in that brief to which the petitioner wishes to respond.

ARGUMENT

I.

The District Court did not consider any new evidence.

The identification made by the victim was supplemented by her testimony at the hearing before the District Judge at

which time she stated that she had identified Mr. Biggers at the trial in the courtroom (Brief in Opposition at 10). The only other evidence that the District Judge heard that had any material bearing on the identification was the expert testimony of a professor from the University of Michigan, Dr. Erwin Pollack, who testified as to the general unreliability of eyewitness identification and identification procedures employed by the police. Dr. Pollack's testimony is detailed in the Brief in Opposition at 9-10.

This is not a case where the District Judge heard new material facts which this Court did not hear when the matter was here before for plenary review. The only really new fact that the District Judge heard was the resolution of the question raised by Mr. Justice Douglas in his dissent, which was whether or not Mrs. Beamer identified the Defendant in the courtroom, and Mrs. Beamer testified at the federal habeas corpus hearing that she had. The State has always insisted that Mrs. Beamer identified the Defendant in the Courtroom. During the course of her testimony the prosecutor asked her, "Is there any doubt in your mind today?" She replied, "No, there is no doubt." Mr. Justice Douglas in his dissent argued that this meant that Mrs. Beamer had no doubt in her mind that this was the person that she had identified *in the previous lineup*. The State insisted that there was no doubt in Mrs. Beamer's mind *at the trial* that this was the person who was the rapist.

Despite this testimony and despite the fact that this Court heard plenary argument on the fairness of the identification employed, the District Judge ruled that the stationhouse identification was improper.

II.

The affirmance by this Court of the conviction of petitioner after plenary consideration of the stationhouse identification forcloses further consideration of the very same issue between the same parties.

This Court heard argument on the stationhouse identification. By a four-four decision it affirmed the judgment of the Tennessee Supreme Court. Nowhere in the Brief in Opposition is any mention made of the failure of the lower courts to apply to the facts of this case 28 United States Code Sec. 2244(c), which says that once the Supreme Court of the United States has decided an issue, that decision shall be conclusive "unless the applicant for the writ of habeas corpus shall plead and the Court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the Court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence."

The District Court, Court of Appeals, and counsel for respondent have ignored this statute. The identification question is not a question which did not appear in the record of the proceeding in the Supreme Court. On the contrary, that is what the argument and plenary hearing in the Supreme Court was all about (see the transcript of that oral argument which was filed as a supplement to the Petition for Certiorari).

III.

A four-four affirmance is not a "technical" affirmance.

The District Judge and respondent's counsel (Brief at 17) speak of this Court's affirmance of the Supreme Court

of Tennessee as a "technical" affirmance. The District Judge even made reference in one of his orders to a "technical affirmation which results from the fortuitous circumstance of an equally divided court." (Appendix at 40)

It is true, as this Court said in *Sanders v. United States*, 373 U.S. 1, 8 (1963), that "conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." Yet, if this Court allows the result reached in the two to one decision of the Court of Appeals to stand, the result will fly in the face of 28 United States Code Sec. 2244(c), and the result reached by the Supreme Court of Tennessee and affirmed by this Court.

CONCLUSION

Because the lower courts' decisions have not only set aside an affirmance by this Court but because they also have had the effect of holding unconstitutional a federal statute, this Court should grant certiorari and give plenary consideration to the issues raised.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-685

WILLIAM S. NEIL, Warden,
Tennessee State Penitentiary,
Nashville, Tennessee,

Petitioner,

v.

ARCHIE NATHANIEL BIGGERS,

Respondent.

MOTION FOR LEAVE TO SUPPLEMENT APPENDIX TO PETITION FOR WRIT OF CERTIORARI

The Petitioner, William S. Neil, Warden, Tennessee State Prison, moves the Court to be allowed to file as Appendix "J" to his Petition for Certiorari the transcript of oral argument before this Court in *Biggers v. Tennessee*, No. 237, Oct. Term 1967, argued January 15, 1968.

No transcript of the argument was made, but Petitioner has obtained with the permission of the Marshal of this Court a copy of the tape recording of the argument from the National Archives and Records Service.

This transcript is submitted in support of Petitioner's argument that, in the words of Mr. Meltsner, counsel for Mr. Biggers, in his opening remarks, "the primary question in this case is whether the total circumstances surrounding petitioner's identification, and its use at trial, violated the due process clause of the Fourteenth Amendment . . ." This is precisely what Petitioner contends this Court considered and decided.

Petitioner has been as diligent as possible in getting this supplementary material together. He wrote the Clerk of this Court on September 10, 1971, requesting a copy of the transcript. Mr. W. V. Gullickson, Assistant Clerk, wrote back on September 17 that "the oral argument in that case was not transcribed." He wrote the Marshal for permission to secure the tape on October 14. He received a communication dated October 21 from Mr. James W. Moore, of the National Archives advising that the sound recording could be purchased. A few days later the sound recording was obtained. The same was approximately 58 minutes and was transcribed and corrected several times to insure accuracy.

WHEREFORE, Petitioner PRAYS that he be allowed to supplement his Petition for Certiorari with the transcript of oral argument heretofore described and hereto attached, and that the same be filed as Appendix "J" to the Petition.

Respectfully submitted,

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APPENDIX "J"

SUPREME COURT OF THE UNITED STATES
No. 237, O. T. 1967

ARCHIE NATHANIEL BIGGERS,
Petitioner,

v.

TENNESSEE,
Respondent.

TRANSCRIPT OF ORAL ARGUMENT

JANUARY 15, 1968

APPEARANCES:

Michael Meltsner, Esq.
New York, New York for Petitioner

Thomas E. Fox, Esq.
Nashville, Tennessee for Respondent

[1] THE CHIEF JUSTICE: No. 237, Archie Nathaniel Biggers, Petitioner, v. Tennessee. Mr. Meltsner.

MR. MELTSNER: Mr. Chief Justice, may it please the Court. This case is here on writ of certiorari to the Supreme

Court of Tennessee to review a sixteen-year-old boy's conviction and sentence to twenty years in prison for the crime of rape. Because the primary question in this case is whether the total circumstances surrounding petitioner's identification, and its use at trial, violated the due process clause of the Fourteenth Amendment, I intend to state the facts in some detail. On the night of January 22, 1965, Mrs. Margaret Beamer, a Negro nurse, was sewing in the living room of her Nashville, Tennessee, home. A twelve-year-old daughter was in a bedroom, listening to phonograph records, and a six-year-old son was asleep in another bedroom. The living room was lit by a single lamp, and the lights were off in an adjoining hallway and kitchen. At about 9:10 p.m., Mrs. Beamer rose and entered this hallway. She was grabbed from behind and pushed to the floor by an intruder holding a long butcher knife. She began to scream and sob, and her twelve-year-old daughter came to the door of the adjacent bedroom and also began to scream when she saw her mother and the assailant. The intruder then said, "Shut up, or I'll kill you both" to the women and he had Mrs. Beamer order her daughter back into the bedroom. He then forced her to walk through an unlit kitchen, out behind the house, up an embankment to some railroad tracks, and took her to a place in the woods where he raped her. The only light behind the house came from the moon, street lights which were located in front of the light . . . in front of the house. There were no lights on the tracks.

THE COURT: Does the record show how old this woman was?

[2] MR. MELTSNER: The only place it does is in a newspaper story introduced in evidence by the prosecution; I believe she is thirty-nine from that . . . that story.

These events lasted from ten to thirty minutes at the most. And Mrs. Beamer testified that throughout she was frightened, in fear, and crying. After the rape, the rapist ran away and Mrs. Beamer reported the crime to the police. After she did this, at dates and times and under circumstances which the record does not particularly reveal, she was shown thirty or forty photographs from police files and saw several suspects at headquarters. However, the record is quite clear that she never was shown the petitioner in this case at these viewings.

THE COURT: Now, let's see, what, what was the date of the incident?

MR. MELTSNER: The date of the incident was January 22, 1965.

THE COURT: And what was the period over which she was shown these photographs?

MR. MELTSNER: The record does not say. The on . . . she was shown these photographs but at no time did the State introduce evidence showing the dates, how long over the period of time between the crime and the eventual identification proceeding.

THE COURT: But the record does show, you say, that none of the confrontations, whether by photograph or otherwise, until she identified this petitioner, was this petitioner?

MR. MELTSNER: Quite, quite clearly. She was asked at one point, "Did you know who raped, who raped you before the pre-trial identification?" She said, "No." The police officer testified that he had never shown photographs of

the petitioner to her. The petitioner took the stand, was not cross-examined about a criminal record . . .

[3] THE COURT: When, when did they pick the petitioner up?

MR. MELTSNER: Well, that took place, that took place seven months later on . . .

THE COURT: By later you mean August . . .

MR. MELTSNER: In August of 1965.

THE COURT: Did the police show this woman pictures . . . other pictures at various times and with the result that she failed or refused to identify any of the other pictures as her assailant?

MR. MELTSNER: She was shown some thirty or forty photographs.

THE COURT: Prior to the time when she was shown the batch of photographs that included the petitioner?

MR. MELTSNER: No, the photographs she was shown did not include the petitioner. She was shown thirty or forty photographs from police files. She was never shown a picture of the petitioner. The record does not show whether she saw these photographs the day after the crime or a week after the crime, although, I must confess, my reading of the record, it certainly seems to be that way. That's the impression. But certainly the record doesn't . . . is really . . . is not clear on this point.

THE COURT: Yes. But in any event, she was shown some photographs of some

people, and she failed or refused to identify any one of them as her assailant?

MR. MELTSNER: She did see one person who she said had features like the rapist. But other than that she identified . . .

THE COURT: You mean she saw a person in person or she saw a photograph?

[4] MR. MELTSNER: It's not clear whether it was a direct viewing or through a photograph, as I recall.

THE COURT: You mean the indications are that she knew what the features of the rapist really were like?

MR. MELTSNER: All . . . She said that one person had features like the rapist. Now when she gave a description to the police at the time the crime was reported, a police officer wrote down what she said, and he described it as, "She told me as best she could," and he wrote it down, and this came out in the course of the trial. The State never offered this contemporaneous description or the record of it into evidence at the trial nor did Mrs. Beamer ever testify as to the . . .

THE COURT: Nor did she ever say that the . . . that this defendant's features were like those she remembered in the rapist?

MR. MELTSNER: That's correct, that's correct. She talked totally in terms of the pre-trial identification, almost totally. She never referred back to the crime . . .

THE COURT: That was only by voice?

MR. MELTSNER: Pardon me.

THE COURT: That was only by voice?

MR. MELTSNER: Well, she didn't identify him until he spoke. He was called into a room. She was sitting there with five police officers, but there was no lineup, and she then requested the police to have him speak. And she said, "Have him say, 'Shut up or I'll kill you.'" And a police officer said, "Say it, say it, boy," and he hesitated, and he said, "Say it," and then the petitioner said, "Shut up or I'll kill you."

THE COURT: How old was the petitioner?

[5] MR. MELTSNER: Sixteen.

THE COURT: At that time?

MR. MELTSNER: At that time.

THE CHIEF JUSTICE: How did the description that she gave at the beginning compare with this petitioner? You may answer that after lunch.

(Recess)

THE COURT: You may continue your argument.

MR. MELTSNER: To answer the question you asked before the recess, Mr. Chief Justice, at trial a police officer revealed that a written report of Mrs. Beamer's description had been taken down at the time she reported the crime, but the State never offered this description into evidence nor did Mrs. Beamer testify about the character of her initial description. Now, seven months . . .

THE COURT: And that's not on the record at all?

MR. MELTSNER: The only thing on the record is that a description was taken down and not offered. That appears on page 50 of the record. I think under accepted . . . to get ahead to my argument, under accepted canons the fact that the State failed to offer this report must be taken to harm rather than help the State's case for Mrs. Beamer's reliability. Seven months after the crime, on the night of August 16, 1965, a Nashville woman was assaulted. The police arrested petitioner, Archie Biggers, a sixteen-year-old Negro with no previous record of trouble with the police as he was receiving medical attention at a local hospital.

THE COURT: For what?

[6] MR. MELTSNER: The newspaper stories, which are the only source of information in the record, state that he claimed he had been cut, and he was with his mother at the hospital. The police arrested him and took him to a juvenile detention facility. His mother was with him, and she was told of what the record only characterizes as his "rights". And the police announced to the newspapers that they were going to question him about a series of rapes. The following day, two police officers went to Mrs. Beamer's home, told her that they had a suspect they wanted her to look at, and brought her to police headquarters. She was seated in a room with five police officers, but no lineup was held. Petitioner was brought to the door of the room, and after looking at him, she asked the police to have him speak and after he spoke these words of the assailant, "Shut up or I'll kill you," she identified him. His mother, father, and retained attorney were not present.

THE COURT: Why did he use those words?

MR. MELTSNER: Because he was told to say them by the police. Biggers was . . .

THE COURT: . . . . .

MR. MELTSNER: . . . that his . . .

THE COURT: At this time the words spoken by the assailant, and he spoke them?

MR. MELTSNER: Yes.

THE COURT: Seven months before?

MR. MELTSNER: Seven months before. Biggers was indicted with rape . . . indicted for rape, a capital offense in Tennessee. But at trial the only evidence tying him to the crime, was Mrs. Beamer's testimony on direct examination, that she had identified him in August, at the police station, and that he spoke the words of the rapist. [7] At first, she denied ever having seen him. That appears on page 9 of the record. She then changed the . . . her, the course of her testimony and described the pre-trial identification.

THE CHIEF JUSTICE: Let's see. What? Would you repeat that again? She first said she had not seen . . .?

MR. MELTSNER: She was . . . she was . . . she was asked on page 9 of the record by the prosecuting attorney, "Now getting to the central facts of this case, "Have you ever seen the defendant before?" She said, "No." She then changed the course of her testimony and described the pre-trial identification. Four policemen also testified on direct . . .

THE COURT: Well, you, . . . that . . . you don't really read that part of the transcript to indicate she, that was testimony that she didn't recognize the defendant?

MR. MELTSNER: I think it reflects on her certainty. This is a due process case and in a sense everything counts, and the fact that she . . .

THE COURT: No, no, no. Things that don't count, don't count, and . . .

MR. MELTSNER: Well, I think it counts that the first answer was "No".

THE COURT: The first an . . . What do you suppose she understood this question to mean?

MR. MELTSNER: Well, it was asked twice in two different ways and both times . . .

THE COURT: Where's the other place?

MR. MELTSNER: Right, two or three lines below it, "Was the defendant at any time at your home?" "If he was I didn't see him." It's an extremely peculiar first response and I grant Your Honor it's totally inconsistent to the weight of her testimony.

[8] THE COURT: . . . in context, it seems was saying that to me, perhaps I'm wrong, that Mrs. Biggers in between the time of the assault upon her and trial, she had not seen the defendant. Otherwise, the whole thing in nonsense.

MR. MELTSNER: It may be that's what she meant, but I don't think the question's directed to that, in terms at least.

THE COURT: What do you think she meant? I'm like my Brother Fortas, I don't see why you should make anything out of that.

MR. MELTSNER: Well, I don't think it's a big point, but does . . . I do think it reflects on her certainty.

THE COURT: What do you think she said?

MR. MELTSNER: I think she was she . . . perhaps was uncertain or confused at the trial. But if she was a person who could have been upset and confused easily, that reflects on her reliability . . .

THE COURT: Don't you really think that what she was saying was before that night, if he'd ever been in my house I never—don't recall him. Wasn't that what she was saying? I don't know why you press that at all, really.

MR. MELTSNER: Well, I—I'll leave it, and get on to the trial where her testimony was totally uncorroborated. The State did offer the testimony of four police officers on direct examination that Mrs. Beamer had identified Biggers at the police station, although the fact of this identification had not been challenged. And the twelve-year-old daughter was unable to identify him. The State claims in its brief that Mrs. Beamer identified Biggers in the courtroom. We dispute this because there is a standard method for identi-

fying a defendant in the courtroom, picking him out, and it wasn't used in this case. A final occurrence at trial . . .

[9] THE COURT: His, Biggers' counsel objected, on page 19, to asking her to identify him again, said he's already done it. "Is there any doubt in your mind today?" Mr. Williams, who I guess was his counsel, says, that "he has asked her that before, Judge, we are going to object to it." The Court says, "All right, is there any doubt in your minds?" And Mrs., the victim, said, "No, there is no doubt."

MR. MELTSNER: Well, I think he was, I think he was objecting to the repetitious nature of that.

THE CHIEF JUSTICE: Repetitiousness of what? Of her identification of him in the courtroom?

MR. MELTSNER: Oh. Is there any doubt in your mind, I, excuse me, I misunderstood the question. I think they are, again, referring to the pre-trial identification. The identification in the courtroom is a question of locating a body among other bodies, not a question of saying the defendant's name. One can . . . talk about a person without knowing exactly who he is. I think there is an important reason why this shouldn't be inferred from the record, not that it's particularly important to this case because the burden of her testimony was of the pre-trial identification. It's important that a witness has to commit him or herself, because in that, that way they're responsible, and any doubts they have are expressed in that way.

THE COURT: At the bottom of page 18, she compares the way he looked at the time of the rape and the way he looks in the courtroom.

MR. MELTSNER: As I read . . .

THE COURT: "That his hair was a little longer."

MR. MELTSNER: As I read that, it's a comparison between the way he looked in the courtroom and the way he looked at the pre-trial identification.

THE COURT: Well, what it says is that, "Yes, the hair. A little longer than it is now." And, "Now" is in the courtroom. That's the bottom of page 18.

[10] MR. MELTSNER: And the question is, whose hair? There is a standard method for identifying someone in the courtroom that just wasn't used here. But again I don't think that's particularly important . . .

THE CHIEF JUSTICE: What is the import of that question? Whether, whether his hair is a little longer at the trial than it was at the time of the crime or whether it was a little longer at the time of the trial than it was at the time of the pre-trial?

MR. MELTSNER: As I read it, it is a comparison between the time of the trial and the time of the pre-trial identification. Nothing in her testimony goes back to seven months, or nine or ten months at this point, to the crime when she's identifying him. A final occurrence at trial

should be mentioned. At the time of Biggers' arrest and identification, highly prejudicial newspaper accounts appeared, based on police statements to the press. Members of the trial jury had seen these stories and a photograph. The State, at the beginning of trial, asked Mrs. Beamer if she had identified Biggers before or after these newspaper stories appeared, thus making the stories an issue at the trial. It's our position that this case is controlled by the Court's decision in *Stovall*, where a show-up or exhibiting of defendant alone was permitted only because there was no other way to have any identification proceeding. But in this case, a lineup was eminently practical. Petitioner was in custody and continuously available. Mrs. Beamer was available; there was no shortage of persons to hold the lineup. Biggers was taken from the juvenile detention facility to a police headquarters in a large city in the daytime, a city in which there . . . there are approximately 75,000 Negroes, and if some short delay was required, not shown by the record, it would not have been prejudicial because the crime had taken place seven months earlier. The dangers of the show-up procedure are well known. They were mentioned in the Court's opinions
[11] last term. Presenting a man alone says there is reason to believe he's guilty. This is the very question which the identification is supposed to resolve. It also magnifies any similarities between the defendant and the criminal because there is no opportunity for comparison. And it affords no test of recollection. Now these dangers worked a particularly harsh result here because of a number of circumstances. Mrs. Beamer's initial opportunity to observe had been slight. The crime took place in a very short period of time. She never saw the rapist in direct light. Indeed, the State concedes in one of its briefs that it was a limited opportunity, and she

was understandably frightened and in fear of her life. Again, the State concedes she was emotionally upset. Secondly, the gap between the crime and the identification was great and her memory must have faded. And thirdly, she relied on her memory of a voice. She didn't identify him until after he spoke. Memory of a voice is a particularly abstract and unreliable factor on which to base an identification.

THE CHIEF JUSTICE: Is there anything in the record to show what her powers of observation were, what her intelligence was, or what her education was, or anything of that kind? That wasn't questioned at all within the trial . . .

MR. MELTSNER: No.

THE COURT: . . . or was it?

MR. MELTSNER: No.

THE COURT: It was not.

THE COURT: Well, wasn't she a licensed practical nurse?

MR. MELTSNER: That's correct. The lesser opportunity to observe or longer the gap between identification and the crime, the more suggestible she was by means of
[12] a procedure which magnified the similarities between the petitioner and the criminal and told her that the police had evidence against him. Now, into this situation, the police not only failed to use available procedures to protect reliability but they affirmatively corrupted the process of recollection by calling Biggers a suspect and making him say, "Shut up or I'll kill you." The more dramatically a person is tied to the crime, the more

likely an identification will be the product of suggestion that the defendant is the criminal rather than any free recollection of the crime. And nothing which took place at trial increased the reliability of this identification.

THE COURT: Suppose . . .? I beg your pardon. Suppose there had been a lineup, a proper lineup in all respects, and that every person in the lineup had said these words, "Shut up or I'll kill you"?

MR. MELTSNER: Totally different situation. It then would have created a spur to recollection. But here it was just one person doing it, and so, the actor in the role, as so often happens in life, were confused.

THE COURT: So you make no point about requiring the petitioner to say these words, apart from the fact that the confrontation was a single one rather than in a lineup?

MR. MELTSNER: Well, we do have a Fifth Amendment claim about this, Your Honor, which is stated at length in the brief.

THE COURT: I understand you, but I'm asking what your position is? In your last statement, I thought—said was to the effect that if these words had been stated in a lineup, then you wouldn't have a Fifth Amendment point.

[13] MR. MELTSNER: No, I, I, my point is that there is no Fifth Amendment contention left after the *Wade* case, as to speech at a lineup, then the suggestibility of the use of these inflammatory words would not have been directed at this young man if a lineup had been held.

THE COURT: So you're saying that it was the coupling only and only the coupling of the single confrontation with the utterance of the words of the assailant that created the Fifth Amendment problem here?

MR. MELTSNER: It created a Fifth and Fourteenth Amendment problem here.

THE COURT: You mean you're accepting *Wade*?

MR. MELTSNER: Well, we, we . . .

THE COURT: Or, are you just accepting it in order to make this argument? Do you challenge the holding in *Wade*, that it does not violate self-incrimination?

MR. MELTSNER: We don't think . . .

THE COURT: . . . to require a person to make statements to let a witness see if he's the guilty man.

MR. MELTSNER: We don't think we have to because this case involves testimony about . . .

THE COURT: Are you waiving it, are you waiving it?

MR. MELTSNER: No. Absolutely not. Absolutely not. We think the Court should reconsider it and base its decision on the volitional cooperation involved in compelled speech. We don't think that need be reached.

THE CHIEF JUSTICE: Mr. Meltsner, is there anything in the record to indicate what

weight Mrs. Beamer put on her first sight of this man and what weight she put on his voice in determining that he was the assailant?

[14] MR. MELTSNER: The first thing she mentioned when she was asked why she identified him is her . . . is his voice, so I would assume it was a heavy factor. Also, she did not identify him when she saw him immediately. She waited until he spoke.

THE CHIEF JUSTICE: That's all of this in the record.

MR. MELTSNER: Another occurrence at trial which we mentioned is . . . is the State's pointing five fingers at the petitioner rather than one. They just didn't rest on Mrs. Beamer's identification which we assert is tainted, but they had four police officers testify as to it. And as I mentioned earlier, they injected this newspaper story into the record, a factor which must have robbed the jury's capacity to objectively appraise this identification. And all the suggestion here was unnecessary. A lineup could have been held. The officer who called Biggers a suspect had been on the force seventeen and a half years. He should have known better. He didn't have to speak, "Shut up or I'll kill you." He could have been made to speak innocent words, words that didn't tie him to the crime in the same way. His parents and counsel could have been present, and the bolstering of this tainted identification and injection of the newspapers to the case were totally unnecessary trial tactics.

GENERAL FOX: Mr. Chief Justice, Associate Justices, May it please the Court.

THE CHIEF JUSTICE: Mr. Fox.

MR. FOX: I don't think that I'm too much in disagreement with opposing counsel with respect to the facts as

[15] shown by the record or with respect to what the law is. I think the difference is the inferences to be drawn from; I think I draw different inferences from the record from what opposing counsel did and it may be that I have looked at the law a little bit different in this respect. In *Stovall*, as I understand it, the question is, and I think that's the question to be determined, the only question to be determined here, is whether or not the identification proceedings were such as are . . . were so unfair as to amount to a denial of due process. Now what amounts to a denial of due process, I think in any given case depends upon the circumstances. Mr. Justice Frankfurter, in one of his cases, it's the *Joint Anti-Fascist Refuge Committee v. McGrath*, reported in 341 U.S. 123, he said, "You weigh the hurt against the good that's to be done." In other cases, I've cited another case . . .

THE COURT: I didn't understand what you said.

MR. FOX: Mr. Justice Frankfurter in that case said in determining what amounted to due process was a weighing of the good . . . of the hurt against the good to be done.

That's not the whole excerpt that I have in my brief, but I think that summarizes it pretty well. Well, in these circumstances, or in the *Stovall* case, the good to be done in that case was that here was the victim, the only person that could identify the defendant—she was not expected to live—I don't know what her condition of mind was at that particular time, but it seemingly might not have been, or it's a possibility, I'll say that, it was not as good as if

she had not been expected, or if she had been expected to live. But under those circumstances the suspect or the accused was carried to the hospital, by himself, and the Court, this Court, held in that case that because of the circumstances it was imperative that the identification be made under those circumstances and it was not
[16] . . . didn't amount to a denial of due process. In this case the circumstances were different, but I think in line with the same rule of law. Mrs. Beamer had, over the time, and I don't know how often it occurred or how regular, but she had identified, as stated by opposing counsel, she had looked at, she had looked at thirty or forty photographs. None of them were the defendant, she said. And I have an explanation for that; that is, he didn't have . . . he had no police record, the police had no photographs of him. She looked at several people during that time. It doesn't say how often or how regular, but during the, from January 22 to August 17 she looked at several people. None of them were the man that she . . . the man that attacked her, or she didn't identify any as the man who attacked her. I think the reason for that is that this was the first time he had been taken into custody by the police. That I think that shows the reliability of her testimony. But the point that I was going to make—over this period of time, I think, the police had decided, whether rightly or wrongly, is impossibility to have a lineup and counsel appointed for every person that Mrs. Beamer might—that might be a suspect. I think they, I believe from one inference that could be drawn from the record is that they really had given up on finding the person who raped Mrs. Beamer. And since that is the case and since this investigation was continuing over a long period of time, I think the totality of the circumstances made it impossible and seems to me like, not warranted in going through all the procedure that

you'd go through in identifying a hot prospect immediately after the incident occurred. I think that it becomes obvious—to the police by this time that Mrs. Beamer, if she was emotionally upset, and I suggest in my brief that she was, I don't know that there's anything that indicates that she was upset, she was frightened part of the time, but over a period of seven months, she had looked at several pictures. She had seen several . . . she had looked at thirty or forty pictures, she had seen several
[17] people. It became obvious that she wasn't quick to identify people who were not guilty. She said that she, of the photographs, she saw one photograph of the person . . . had features like the defendant. So it appears that she was being very . . .

THE COURT: Excuse me, like the assailant?

MR. FOX: Like the assailant, yes, sir.

THE COURT: But what puzzles me about this is she was never able to say anything about the features of any assailant.

MR. FOX: Yes, sir, well, I think that the record indicates that she did.

THE COURT: That she did?

MR. FOX: That she did say something about it, and I'm not disputing what the printed record said as stated by my opposing counsel, but I think from the inferences we can say that she did say something about him. The police, one of them, testified that she did give a description. Nothing was asked about what she said in that description. But she said, as pointed out by Mr. Justice Stewart a while ago, that his hair was longer at the time she was assaulted, than it was at the identification or during the trial.

THE COURT: That's clear in the record?

MR. FOX: Yes, sir, that's . . . I think no question about it. That that's clear in the record. That is saying her identification prior to the lineup, her identification given at the trial prior to the lineup, she's saying, "He looks like he does now except his hair was shorter I believe it was at the time the incident occurred." She also said this, she said that his shirt was open and when he got on top of me, I could see that he had . . . I could tell or he had a big flabby breast and that he had a fat abdomen.

Now, nobody disputed that. This was seven months [18] prior to the time of the trial. If the defendant didn't meet that description at that time, he had been given notice. She had testified to that. It was up to him to refute that kind of evidence, so I think she did give considerable evidence about what he looked like at the time of the trial. She also said his voice, that she had some teenage boys and that his voice sounded considerably like those voices. Now here's a point I want to make. After she saw the defendant, and I say in my brief that the circumstances were limited, they're always limited to some extent in this sort of an incident. She said she never seen him before the attack. She didn't see him between the time of the attack and the arrest until she got down at police headquarters. But she said that there was light on in the hall, and he threw her down in the hallway of her home, I believe. She said that she looked up into his face, that she saw him, she saw him in the home too. It's not clear just how much she saw him. It looks like the daughter might have had as good an opportunity to see him as Mrs. Beamer. The daughter said she couldn't identify him, but I want to say, the daughter did relate some circumstances about his appearance that corroborated what

her mother had said about him. But after she saw him at the police headquarters, and incidentally, one of the policemen said there were five policemen present. The defendant said, in the room where he was identified, there were two policemen, Mrs. Beamer and another woman. Now, that's, I think an important point. It's argued that with five policemen present that that of itself suggested that maybe Mrs. Beamer didn't feel free to speak up. Well, I think what the policeman is saying there are five policemen around headquarters, but the defendant's testimony is they were two policemen in the room where the identification took place, Mrs. Beamer, and another woman.

THE COURT: Yes, but how many testified as to her identification at the trial?

MR. FOX: How many?

[19] THE COURT: Policemen?

MR. FOX: The Court please, I can't answer it. There was one police officer that really testified to it, and I think maybe that might have been . . .

THE COURT: Is that all?

MR. FOX: As far as I remember, she . . .

THE COURT: I thought we were told that four police officers testified to what happened at the identification?

MR. FOX: If the Court please, I really don't know. I can't—that was a question I didn't anticipate.

THE COURT: Isn't that in the record? I suppose we have the full trial record?

MR. FOX: Yes, Sir, we got the full trial record and I . . .

THE COURT: Well, that's all right.

MR. FOX: I think I can find out. One policeman testified very—I think at length about what took place. Now there were some others that maybe had something to say, but I'm just . . . there's an Officer Cathey that really related the circumstances that took place. The others, didn't, if they testified, and I think they did, I think I'm mistaken, it wasn't as fully as Officer Cathey testified. Now after she saw the defendant she still didn't say this is him. She said, "Let's hear him talk." And after he said these words that the assailant said to her, she said, "This is the man." Now one of the reasons I think back of *Wade* and *Gilbert*, is that in the type of lineup that's talked about there, the defendant doesn't . . . he's in a circumstance or so situated that he can't tell what goes on. He doesn't know what the police do and what the suggestive gestures are made or what's said or anything of the sort. That wasn't true in this case. This defendant was in the room. He could see who was taking part in his identification, and what was done. What I'm
[20] saying is that under these circumstances it is possible to reconstruct what took place because the defendant was there present and saw it. He could have informed his counsel as to what took place and counsel wouldn't have had to cross-examine in the dark as suggested in some of the other . . . in *Gilbert* or *Wade*. I've forgotten, maybe it's suggested in both of them. That is not the way . . .

THE COURT: You think this procedure was preferable to a lineup then? You think . . .

MR. FOX: No, Sir, I . . .

THE COURT: That a sixteen-year-old boy was given an advantage by being taken alone to the doorway of this room and then he could, with the wisdom that we all know is characteristic of sixteen-year-old boys—that wisdom and self-possession—observe what was going on and later give his counsel an account of it?

MR. FOX: No, Sir. I think it would have been more protective if he had been placed in a lineup with counsel present . . .

THE COURT: Why didn't they put him in a lineup?

MR. FOX: Sir?

THE COURT: Is there any reason in the record here why they didn't put him in a lineup?

MR. FOX: No, Sir. I don't think so, but I think the inference is that she had been down to the . . . Mrs. Beamer had been down to the police quarters so many times. She had looked at so many people, I think the police, by that time, surely decided that she was going to be cautious and she was not going to identify anybody until the real person comes along. And I think it would have involved too many lineups and too much red tape, if the Court please, to have kept on doing this every time.

[21] THE COURT: Does this record show that she was confronted by anybody else, any other suspect?

MR. FOX: This record shows that she was asked to identify several different people as . . .

THE COURT: Does it show that she was confronted by several different people, or shown, or does it . . . or may it not be that she was shown their pictures?

MR. FOX: Court please, I'm not sure I understand you. She was shown thirty or forty different pictures to identify . . .

THE COURT: I know, and I'm asking you whether she was shown other living people other than . . .

MR. FOX: Yes, Sir, yes, Sir . . .

THE COURT: . . . this sixteen-year-old boy?

MR. FOX: The record says several. The record says several. It doesn't say how many or at what periods of time or the regularity or anything of the sort. I think that perhaps the inference to be drawn from the record is that everytime the police found somebody that had raped somebody else they'd call Mrs. Beamer down there to see, "Well, is this the one that raped you?" and she . . .

THE COURT: Well isn't the lineup customarily used in Nashville?

MR. FOX: I would think so, if the Court please, but I don't know. The record doesn't indicate whether it is or not. I would think so. I think the reason for it

in this case, as I said before, that the inference to be drawn from the record was that this was happening so often and no result, that it just got to be a matter of routine and maybe the officers did get a little careless about it, but I think . . .

THE COURT: Mr. Fox, in this connection I see on page, maybe you can help me on it, on pages 24 & 25 of the record, this is on cross-examination of Mrs. Beamer, the attorney says, "And that was the second time you
[22] were allowed to see him?" She says, "That is correct." And then a little later she says, "That was not the first time I had been down to look at 'the' suspect."

MR. FOX: Yes, Sir. I don't think she meant by that this particular suspect. I think that was not the first time that she had been down there.

THE COURT: Well, I know, but this one is a . . . I can't find any antecedents to this at all.

MR. FOX: Yes, Sir, well . . .

THE COURT: And that was the second time you were allowed to see "him".

MR. FOX: Well, the record shows this was the first time he had been to police headquarters.

THE COURT: And this was the first time she had ever . . .

MR. FOX: This was the first time she . . .

THE COURT: This was the first time she had been asked . . .

MR. FOX: Yes, Sir, yes, Sir, and I think the testimony is a little confusing. Maybe she didn't understand the question. There was a good bit . . . This was a pretty heatedly tried lawsuit and there was right smart controversy in it and I don't think she understood it, but this was the first time he had been in the police headquarters. And I may have added that they didn't have his picture, but I just think the inference to be drawn is that if he hadn't been there, if they hadn't arrested him, he had no police record, they didn't have any pictures to show. And I think that tends to show that she was careful and that she had time to cool off. I know in Mr. Wall's treatise on eyewitness identification he says that the length of time is a matter to be considered, but in this case I think that that was favorable to the State's position because this lady had taken her time. She cooled off and had made [23] it evident that she wasn't desperate to identify anybody. She was waiting until the right man came along. Now her daughter's testimony . . . her daughter couldn't identify the assailant, but her daughter gave this same description of him. She says that he had long hair . . . that he was large . . . that he was a member of the Negro race, and one other identifying feature that her mother had given. I've forgotten exactly what it is. I've got the citation here, I believe, on page 83. She even said (I don't know that this is material), but the daughter even said that the defendant had on a short sleeved shirt. Well, her mother testified to that. That may not be material, but it certainly corroborates to some extent what her mother had to say about it. Now, as I said before, I know it would have been some protection if coun-

sel had been present, but the purpose of having counsel there is to help to reconstruct what happened. The argument is made that because this is a boy and he wouldn't know how to protect himself and things of that sort, I don't really think that enters into this question, because certainly under *Wade* and *Gilbert*, if there was ever any doubt about it, there's not now, a defendant can be made to testify, I mean, made to make a statement for the purpose of, of knowing how his voice sounds. So I don't know of anything that counsel could have done if he had been there except to reconstruct the circumstances and it's not shown that the defendant was handicapped in any way. He was a sixteen-year-old boy but I don't know that that means he couldn't have been as observant as any, as an adult. All he had to do . . . he was present and could recite what happened. So, we think that that is not really sufficient to say that it amounts to a denial of due process in this case because counsel wasn't present. The Court please, I believe that just about finishes my presentation.

THE COURT: Mr. Fox, may I ask if he was arrested for another rape, was he not?

[24] MR. FOX: Yes, sir.

THE COURT: Whatever happened to that case?

MR. FOX: The Court please, the record doesn't show, and there was some argument made at one time about whether or not he was gotten properly over from the Juvenile Court over to the Criminal Court, but that's not . . . no longer in the case so far as I understand . . .

THE COURT: Is he charged now with that other rape?

MR. FOX: I think, Your Honor, please, I know from reading, or at least I read in the newspaper that there was other charges of this type pending against him. I don't know that, but I think I read that in the paper, and I think that's the circumstance.

THE COURT: Do you know whether they were dismissed or not?

MR. FOX: No, Sir, no, Sir.

THE COURT: Are the charges still pending?

MR. FOX: I do not know. I don't have any knowledge of any of the other circumstances or how many other cases were charged against him other than the one for that particular rape.

THE COURT: Is there anything in this record about that case at all?

MR. FOX: Not very much. It's a little came . . .

THE COURT: What is it?

MR. FOX: All right. The only thing . . . the trial judge was trying desperately to keep out any information about the other rapes. On cross-examination, Mrs. . . . one of the officers, this Officer Cathey, was asked, "Well, when did you first see the defendant?" He said over at a particular place and, of course, that was evident that it was where he was arrested in the other case. And
[25] that, as far as I know, that's about as much as ever got into it. It's argued by opposing counsel that

this is enough to indicate to the jury there was another case pending against him. And they make that argument some and that contention some during cross-examination. But that's about the extent of it.

THE COURT: Well, that would probably have some effect on the jury, wouldn't it, if they . . .

MR. FOX: Yes, Sir, if it got into the record . . .

THE COURT: . . . if he was arrested for another rape before he was arrested here?

MR. FOX: Yes, Sir, but this was the defendant's counsel bringing that out. This wasn't the State. Defendant's counsel was asking these questions to bring that evidence out. The trial judge was trying his best to keep it out and the district attorney, the prosecuting attorney, made the statement, and it's in the record, that he had cautioned the witness, I don't know whether this must not have been before the jury, but he had cautioned the witness not to mention the other offenses so the State . . . The prosecution and the court had made some effort to keep this out about the other offenses.

THE COURT: But, Sir, you have no information as to whether that was a provable case or whether it is still considered a live case by the State or not?

MR. FOX: No, no, no, Sir, I don't. It can't be determined by this record.

THE COURT: Is it a charge on his record now?

MR. FOX: No, Sir, you can't tell by this record that it's still a charge, whether it's still a charge against him or not. And I don't know, I really don't know, if the Court please. Opposing counsel may have some information about that.

[26] THE COURT: Was there any evidence to this case at all other than the identification of Mrs. Beamer?

MR. FOX: No, Sir, I don't believe so. I think it depends upon her identification. Now, let me say this, on his examination he testified and his mother testified to some circumstances that I think—I don't know what the inference to be drawn from it would be, but I certainly think it hurt him before the jury because he was a sixteen-year-old boy and his mother said that when she went anywhere she called back, at one place I believe she said about every hour to see if he was still at home. He testified to those circumstances. He didn't go anywhere. He never got away from home. And then it develops, and this came from one of the defense witnesses, that when his mother was away she had somebody watching him to see that he did stay at home, and I think that certainly hurt him before the jury and I don't know what inference could be drawn from it except that he was a peculiar sort of a child, that he was the sort of person that his mother had somebody watching . . . I think for fear . . . certainly she wouldn't have been afraid that a sixteen-year-old boy would do something to hurt himself. It seems to me like the jury could properly infer, they got the idea it was to keep him from getting into trouble somewhere. And he was a most peculiar and lone type boy. That's part of the defense proof, not our proof,

and I don't know that it's material before this Court, but it certainly made a difference with the jury, I would say.

THE COURT: Mr. Meltsner.

MR. MELTSNER: Just a few points, may it please the Court. First, I must object to the characterization of him as a "peculiar boy" by these defense witnesses. On the contrary they testified to his good character, reliability, and reputation, and I believe what they said was that he was very concerned about his mother. He and his
[27] mother seemed to look after each other, and this was a broken home. The step-father had left and was living somewhere else. I don't believe the testimony was that she had people looking after him unusually. There were just neighbors who lived in the vicinity. Now in answer to Justice White's question earlier, four police officers did testify to the identification. Four of the five that were present and the fifth, I believe, was sick, and that's the only reason he didn't testify.

THE COURT: Well, what . . . is your constitutional point that this is a due process question, that it really is amounting to saying that this is . . . that there just isn't any evidence to support this verdict?

MR. MELTSNER: That is one way I think it could be looked at.

THE COURT: Well, how else do you look at it? If this evidence was worth a jury considering, why I suppose you wouldn't have much of a case. You're just saying, it was so unreliable as to be inadmissible?

MR. MELTSNER: That's correct.

THE COURT: Or at least so unreliable it can't support a conviction.

MR. MELTSNER: Correct.

THE COURT: *Thompson* against *Louisville* case.

MR. MELTSNER: I think that's one way of looking at it, but I think you can also see it through cases like, well, first of all, *Stovall*, is the primary value, but also cases like *Turner v. Louisiana*, and all the cases like *Napue*. There's not a very big difference between leading one to testify falsely and leading one to testify on the basis of a mistaken identification. And this is . . . the identification was the trial of this case. The trial was an
[28] appeal from the identification. And when the police officers came in and kept harping on it, the authority of the police officers must have made it far more difficult for the jurors to accurately appraise the identification. Now, I just . . .

THE COURT: What did all these five officers, or as many of them as testified, testify to, to this identification that Mrs. . . .?

MR. MELTSNER: "Were you present in the police station. Did Mrs. Beamer identify this young man?" "Yes, she did," et cetera.

THE COURT: They used all of them, all of them to corroborate . . .?

MR. MELTSNER: Correct. And objection was made that this was not evidentiary, it

was just harping, and those objections were overruled. To the extent the State seems to use the gap between the crime and the identification to explain away the show-up procedure, I think it clearly must be the State's burden to show factors, circumstances which occurred during that period to enhance reliability. This record is just not enlightening on that point. The State never, never carried that burden. And clearly the petitioner can't carry that burden because he doesn't know what the police has done during that period. And it would be, it seems to me, that the State's primary defense, as raised here . . . it may be good in certain other cases . . . but it's not good on this record because the record just doesn't establish the circumstances of these earlier identifications. There may have been lineups held. Photographs may have been shown in July. They may have been shown in February. One doesn't know and it's the State's burden to explain it away.

THE COURT: To what extent was the original arrest for rape made mention in this case? I don't mean his arrest. I mean the arrest for another rape.

[29] MR. MELTSNER: This is all outside of the record. My understanding is that he was not arrested for rape, he was arrested on a loitering charge. And he was held on this loitering charge while the police showed him to various people, including the woman who was assaulted, not raped, assaulted on the 16th of August.

THE COURT: Was there some article in the newspaper, you say, about that?

MR. MELTSNER: Yes, yes . . .

THE COURT: And that was prior to his trial?

MR. MELTSNER: That is how another case was injected by the State before the jury. The newspaper stories which I have referred to describe the arrest. They say he confessed to certain things. They say that he was identified by certain women. The State began its presentation to the jury by asking Mrs. Beamer if she had identified him before or after these newspaper stories had appeared, and many of the jurors had read these stories.

THE COURT: They said so? On the voir dire?

MR. MELTSNER: That is correct. It took three or four days to select a jury in this case, for that reason.

THE COURT: You don't mean the jurors, now, you mean the venire . . . members of the . . .

MR. MELTSNER: Members of the sitting panel had, according to a statement of counsel in the trial court, jurors who had been accepted for the trial, had known about these stories. And there is . . .

THE COURT: Served as members of the jury?

MR. MELTSNER: That's the inference from that statement, yes. Yes. Despite the fact they had seen these stories.

THE COURT: Where is that in the record? . . . Well, I, we can find it.

[30] MR. MELTSNER: It's, it's, I'm sorry, Your Honor, it is a point made by counsel when he's objecting to this other case being mentioned.

THE COURT: Do you raise any such point in your petition for certiorari?

MR. MELTSNER: Concerning?

THE COURT: Questions presented?

MR. MELTSNER: Not exclusively, we raise the . . .

THE COURT: Did you raise it at all? I've just read it and I don't find it.

MR. MELTSNER: I believe in the petition we, we mentioned the . . .

THE COURT: . . . question presented?

MR. MELTSNER: No. Not the newspaper itself. It's just another factor in the case.

THE COURT: Do you know what's become of that other charge, that original charge?

MR. MELTSNER: My un . . . my best understanding is this . . . he has never been indicted for the assault that took place on August 16, but he has been indicted for two other charges in Davidson County, and these charges have not come to trial. But the original one, he has not been indicted on.

THE COURT: Those are rape charges?

MR. MELTSNER: Yes.

THE COURT: Very well.

CERTIFICATE OF ACCURACY

I, a member of the Supreme Court Bar, certify that I have compared this transcript with the sound recording and it has been accurately transcribed.

BART C. DURHAM, III